



# **IN THE COURT OF CRIMINAL APPEALS OF TEXAS**

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**NO. PD-0979-17**

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**KELLY JO IVEY, Appellant**

**v.**

**THE STATE OF TEXAS**

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**ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW  
FROM THE FIRST COURT OF APPEALS  
HARRIS COUNTY**

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**ALCALA, J., filed a dissenting opinion in which WALKER, J., joined.**

## **DISSENTING OPINION**

The September 11, 2001, terrorist attacks killed more law enforcement officers in the line of duty than any other single incident in American history, and today our citizens remain personally impacted by those acts that killed so many innocent people, including sixty police officers. So what does that horrific terrorist act have to do with this case? Absolutely nothing—except for the fact that the State's prosecutor inflamed the jury through an extremely improper punishment-phase closing argument linking the tragic loss of police

officers on September 11, 2001, to Kelly Jo Ivey, appellant, who was convicted of intoxication manslaughter for causing the 2014 death of a Harris County sheriff's deputy. Appellant objected to this improper argument, the trial court overruled her objection, and the court of appeals affirmed. *See Ivey v. State*, No. 01-15-00804-CR, 2017 WL 3389906, at \*1, \*6-7 (Tex. App.—Houston [1st Dist.] Aug. 8, 2017) (mem. op., not designated for publication). I would grant appellant's petition for discretionary review challenging the court of appeals's determination that this was a permissible plea-for-law-enforcement argument, hold that the State's closing argument was improper, and remand this case to the court of appeals for a harm analysis.

Appellant was convicted of intoxication manslaughter for killing a peace officer after appellant's SUV veered into oncoming traffic and collided head-on with Deputy Valdez's Sheriff's Department vehicle. On September 11, 2015, in the State's closing argument during the punishment phase, the prosecutor said,

I thought about this this morning on the drive in. The longer we get away from September 11th, the more everyone goes back to their regular lives and tends to forget about what happened that day; and here are the 12 of you—13 of you on September 11th, a day when we remember our heroes and look out there and look at every peace officer. Every peace officer that is wearing a badge stand up.

Trial counsel immediately objected that the State's argument was improper and highly prejudicial. Overruling that objection, the trial court said, "Have a seat."<sup>1</sup> Referring to the

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<sup>1</sup> It is unclear from the record whether the trial court's instruction to sit down referred to police officers in attendance who may have stood in response to the prosecutor's request, or if the court's admonishment to be seated was aimed at defense counsel who may have stood while stating his

police officers in the audience, the State then continued, “Those men put on a bulletproof vest and they will give their lives for every one of you; and you know what, they probably in this case, they did give their life for her.” A fair reading of this record reveals that the prosecutor referred to peace officers who were apparently sitting in the audience, asked them to stand up to be recognized, and implicitly argued to the jury that the community expects that the service of those officers and the September 11th attacks should be remembered and considered when deliberating on the appropriate sentence for appellant. The jury sentenced appellant to sixty years in prison and a \$10,000 fine.

I conclude that this argument was far outside the bounds of a permissible plea-for-law-enforcement argument that should focus on the particular circumstances of the offense as the basis for determining the appropriate sentence for a defendant. A prosecutor may make a plea for law enforcement, but there are limits to this type of argument. *See Freeman v. State*, 340 S.W.3d 717, 729 (Tex. Crim. App. 2011) (noting that a plea for law enforcement is an acceptable closing argument; in making that argument, the State may address the concerns of the community but may not argue that the community or any segment of the community demands or expects a certain verdict or punishment). Appellant argues in her petition that the prosecutor impermissibly asked the jury “to strike a blow for all police officers, and particularly the first responders in New York on 9/11.” I agree. The State’s argument would have been a permissible plea for law enforcement if the prosecutor had

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objection.

acknowledged the visible presence of peace officers in the courtroom and thanked them and the complainant for their heroic service to the community. But this prosecutor strayed far beyond a permissible plea for law enforcement. Rather, the prosecutor invoked a specific devastating terrorist incident that killed approximately three thousand people, including numerous peace officers, embattled the nation in war for years, and altered society's balance between freedom and security. And further, the prosecutor chose to employ that reference on the anniversary of the attacks when Americans are apt to remember the sacrifices by first responders that day and reflect on how momentously that day's events have shaped the then-past fourteen years. That inflammatory reference was outside of the record and outside of the bounds of a permissible plea for law enforcement because it injected a specific heinous criminal event into the instant proceedings and suggested that the jury should punish appellant more harshly due to an event unrelated to appellant's offense.

The State's closing argument focusing on a specific criminal act unrelated to appellant's offense was clearly erroneous because it essentially told the jury that the community expected a particular result of a lengthy prison sentence for appellant as a way of honoring the heroes of September 11, 2001. *See id.* (noting that a jury argument is an improper plea for law enforcement if it is designed to induce the jury to convict the defendant or assess a particular punishment based on the desires or expectations of the community) (citing *Cortez v. State*, 683 S.W.2d 419, 420-21 (Tex. Crim. App. 1984)).<sup>2</sup> This Court must

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<sup>2</sup> See also *Gonzalez v. State*, 115 S.W.3d 278, 284-85 (Tex. App.—Corpus Christi 2003, pet. ref'd) (holding that prosecutor's argument during punishment phase was improper where prosecutor

step in when state prosecutors commit acts or pose arguments that might cause a jury to ignore the facts about the offense in the record by making decisions based on what the jury believes is expected of them by the community. This is such as case. Perhaps there is a basis for finding this improper argument harmless, and I do not reach that matter at this juncture. Rather, at this point, I would hold only that the State's closing argument was prejudicial, inflammatory, and improper. Accordingly, I would grant appellant's petition for discretionary review, reverse the judgment of the court of appeals, and remand this case for a harm analysis. Because this Court instead refuses to grant appellant's petition for discretionary review, I respectfully dissent.

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compared defendant to Osama bin Laden; "While invoking horrific memories of the events of September 11 in the minds of the jurors, the prosecutor's argument effectively asked the jury to punish appellant as they would punish Osama bin Laden. We see no plausible reason for the harmful remarks other than to deprive appellant of a fair and impartial trial.").